A

LOH LIANG GUN & ANOR

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
LOW HOP BING JCA
RAUS SHARIF JCA
[CRIMINAL APPEAL NOS: P-09-26-00 & P-09-13-04]

C

15 JUNE 2007

CRIMINAL LAW: *Penal Code - Sections 420 and 109 - Cheating and abetting - Appeals against convictions and sentences - Standard of proof - Defence of pre-approval - Whether charges should have been amended from s. 109 to s. 107 Penal Code - Insufficiency of evidence - Whether sentences excessive - Penal Code, ss. 107, 109, 420 - Criminal Procedure Code, s. 158*

D

Both the appellants were convicted and sentenced by the Sessions Court judge ('trial judge') and their appeals to the High Court were dismissed. The first appellant was convicted on ten counts of cheating under s. 420 of the Penal Code ('Code'), and sentenced to four years' imprisonment on each of the first five counts and five years' imprisonment each on the rest, all the ten sentences to run concurrently. The second appellant was convicted on nine counts of abetting the first appellant, punishable under s. 109 of the Code, and sentenced to two years' imprisonment on each of the first four counts and three years' imprisonment of the other counts, all the nine sentences to run concurrently. The ten charges preferred against the first appellant concerned the offence of cheating one Hong Leong Finance Bhd ('Hong Leong Finance') by dishonestly inducing its staff to believe that the particulars contained in ten sets of proposal forms for hire purchase loans for vehicles in the applicants' names respectively were true and correct and to deliver ten payments totalling RM440,000 to one Shen Hua Used Car Trading Co. ('Shen Hua'). The second appellant was charged with abetting the first appellant in the commission of the offences contained in charges two to ten. The appellants appealed, submitting that: (i) the trial judge had wrongly applied the *prima facie* standard of proof; (ii) the transactions in question had in fact been pre-approved by the branch manager of Hong Leong Finance ('PW3') and the first

E

F

G

H

I

appellant had merely filled in the particulars, as a result of which it could not be said that it was the first appellant's deceit that had caused the delivery of the monies in question; (iii) the trial judge should have invoked s. 158 of the Criminal Procedure Code to amend the charges under s. 109 to charges under s. 107 of the Code; (iv) apart from the evidence that the monies had been delivered to the second appellant's bank account, there was nothing to incriminate him since photocopies of the invoices were not admissible; and (v) the sentences imposed on the first appellant were excessive as he was a businessman by profession and a first offender.

Held (dismissing the appeals)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) The trial judge had considered the sufficiency of evidence and applied the standard of proof of beyond any reasonable doubt before he ordered the first appellant to enter his defence. Therefore, there was no error or miscarriage of justice. Be that as it may, it has been held that in an exceptional case, where the evidence is clear and cogent, an appellate court may affirm a conviction despite misdirection. On the evidence of this case, there was overwhelming evidence to show that the prosecution had proved all the charges against both the appellants herein beyond reasonable doubt and that in both the courts below, there was no misdirection of law relating to the standard of proof. The appellants had neither suffered any prejudice nor been denied a fair trial. (paras 32, 33 & 35)

(2) Although the first appellant had mounted an incisive cross-examination of PW3, the issue of PW3's approval had never been posed or suggested to PW3. Both the courts below found no evidence of pre-approval whatsoever. In fact, PW3 testified that the first appellant was at the material time the marketing officer dealing with and taking charge of those ten transactions. He gave his approval thereto on the basis of the first appellant's recommendations on the proposal forms which were completed and submitted by the first appellant. The first appellant had dishonestly entered a whole range of false particulars in the proposal forms for the purpose of deceiving Hong Leong Finance. The defence in the course of cross-examining PW3 had not challenged PW3 on this and, therefore, PW3's evidence in this regard must be deemed to

A have been accepted by the defence as uncontroverted. Both the courts below had very carefully considered and correctly rejected the first appellant's defence of pre-approval. (paras 39, 40, 41 & 43)

B **(3)** The defence's contention that the abetment charges should be amended from s. 109 to s. 107 of the Code was indeed unsustainable. A careful reading of these two sections clearly shows that each and every circumstance contained in s. 107 as constituting abetment has also been incorporated in the C Explanation to s. 109. Section 109 and the Explanation thereto must be read as a whole *ie*, in conjunction and not in isolation. There can be no question of amending the abetment charges from s. 109 to s. 107 of the Code when these two sections refer to identical circumstances. The amendment D raised in the defence's contention, if sustained, would have resulted in the accused not being informed of the punishment under s. 109 of the Code. That would have deprived the second appellant of the opportunity of knowing fully the maximum sentence provided for the offences with which he E had been charged, and certainly would have run counter to the fundamental rules of natural justice. The abetment charges under s. 109 of the Code are flawless and proper, and require no amendment at all. (paras 49, 50 & 51)

F **(4)** The second appellant had provided the first appellant with invoices bearing the letterhead of Shen Hua of which the second appellant was the sole proprietor. As the second appellant was the maker and author of these invoices, they were clearly admissible. The purpose of the invoices was to G secure hire purchase loans from Hong Leong Finance. There was overwhelming evidence of abetment, in that the second appellant, by making and providing these invoices, had intentionally aided the first appellant in the commission of the offences of cheating. The second appellant's conduct clearly H came within the ambit of abetment as defined in s. 107(c) and also the third limb of the Explanation to s. 109 of the Code. In relation to his own invoices, the second appellant had not even made a feeble attempt to cross-examine prosecution witnesses, especially PW3. This would amount to an I acceptance of their testimonies. The second appellant could

not be heard to say that these invoices issued by him were inadmissible. Both the courts below had correctly dismissed this contention by the defence. (paras 55, 56 & 57)

(5) It was abundantly clear that these appeals were essentially against the concurrent factual finding of both the courts below based on evidence adduced at the trial. Save in exceptional circumstances *eg*, where the finding of facts is plainly against the weight of evidence, or the inference of secondary facts is unreasonable or illogical thereby warranting appellate interference, an appellate court is slow in disturbing the concurrent finding. (para 58)

(6) There was no merit in the first appellant's appeal against the aforesaid sentences. The process of sentencing involves an exercise of judicial discretion by the trial judge, having regard to the facts and circumstances prevailing in each particular case. In the absence of any unauthorized, extraneous or irrelevant exercise of discretion by both the courts below, this court should be slow and indeed should refrain from disturbing the aforesaid sentences. (para 63)

Bahasa Malaysia *translation of headnotes*

Kedua-dua perayu telah disabit dan dihukum oleh hakim Mahkamah Sesyen ('hakim bicara') dan rayuan mereka ke Mahkamah Tinggi telah ditolak. Perayu pertama telah disabitkan dengan sepuluh kesalahan menipu di bawah s. 420 Kanun Keseksaan ('Kanun'), dan dihukum empat tahun penjara bagi setiap lima kesalahan pertama dan lima tahun penjara bagi kesalahan-kesalahan selebihnya dengan semua hukuman berjalan serentak. Perayu kedua disabitkan dengan sembilan kesalahan bersubahat dengan perayu pertama yang boleh dihukum di bawah s. 109 Kanun, dan dihukum dua tahun penjara bagi setiap empat kesalahan pertama dan tiga tahun penjara bagi kesalahan-kesalahan selebihnya dengan kesemua sembilan hukuman berjalan serentak. Sepuluh pertuduhan yang dihadapkan kepada perayu pertama adalah berhubung penipuan ke atas Hong Leong Finance Bhd ('Hong Leong Finance') dengan cara mendorong secara tidak jujur kakitangan pihak terkemudian tersebut untuk mempercayai bahawa butir-butir yang terkandung di dalam sepuluh set borang cadangan untuk mendapat pinjaman sewa beli kenderaan-kenderaan atas nama perayu-perayu adalah benar dan betul, sekaligus mendorong

A mereka untuk menyerahkan sepuluh bayaran berjumlah RM440,000 kepada satu Shen Hua Used Car Trading Co. ('Shen Hua'). Perayu kedua dituduh bersubahat dengan perayu pertama dalam melakukan kesalahan-kesalahan yang terkandung dalam pertuduhan-pertuduhan kedua hingga kesepuluh. Perayu-perayu merayu dan
B berhujah bahawa: (i) hakim bicara telah menggunapakai standard bukti *prima facie* yang salah; (ii) transaksi-transaksi berkenaan telah mendapat pra-kelulusan pengurus cawangan Hong Leong Finance ('PW3') dan perayu pertama hanya mengisi butir-butir, berakibat ianya tidak boleh dikatakan bahawa penghantaran adalah
C disebabkan oleh penipuan perayu pertama; (iii) hakim bicara sepatutnya menggunapakai s. 158 Kanun Prosedur Jenayah dan meminda pertuduhan-pertuduhan di bawah s. 109 Kanun kepada pertuduhan di bawah s. 107 Kanun; (iv) selain dari keterangan bahawa wang telah dikreditkan ke akaun bank perayu kedua, tidak
D terdapat apa-apa pun yang mengaitkan beliau dengan kesalahan memandangkan salinan inbois-inbois tidak boleh diterima-masuk; dan (v) hukuman yang dijatuhkan ke atas perayu pertama adalah terlalu berat mengambilkira beliau adalah seorang ahli perniagaan dan pesalah pertama kali.

E

Diputuskan (menolak rayuan-rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

F **(1)** Hakim bicara telah mempertimbang kecukupan keterangan dan menggunapakai standard pembuktian di luar keraguan munasabah sebelum memerintahkan perayu pertama membela diri. Oleh itu, tiada kesilapan atau salah laksana keadilan berlaku. Walau apapun, telah diputuskan bahawa dalam suatu
G kes yang luar biasa, di mana keterangan adalah jelas dan kukuh, sebuah mahkamah rayuan boleh mengesahkan sabitan walaupun berlaku salah arahan. Berdasarkan keterangan dalam kes ini, terdapat limpahan keterangan yang menunjukkan bahawa pendakwaan telah membuktikan semua pertuduhan
H terhadap kedua-dua perayu di luar keraguan munasabah dan bahawa di kedua-dua mahkamah di bawah, tidak terdapat salah arahan undang-undang berkaitan standard pembuktian. Perayu-perayu tidak mengalami apa-apa prejudis dan tidak dinafikan satu perbicaraan yang adil.

I

(2) Walaupun perayu pertama telah melancarkan satu pemeriksaan balas yang terperinci ke atas PW3, namun isu kelulusan oleh PW3 tidak pernah diutarakan atau dicadangkan kepada PW3. Kedua-dua mahkamah di bawah mendapati tiada apa-apa keterangan mengenai pra-kelulusan. Malahan, PW3 memberi keterangan bahawa perayu pertama pada waktu material adalah pegawai pemasaran yang berurusan dengan dan mengawali kesepuluh transaksi tersebut. Beliau memberikan kelulusannya berdasarkan kepada syor perayu pertama di borang-borang cadangan yang sempurna diisi dan dikemukakan oleh perayu pertama. Perayu pertama telah mengisi butir-butir yang palsu keseluruhannya di dalam borang-borang cadangan bagi maksud memperdaya Hong Leong Finance. Pembelaan semasa memeriksa balas PW3 tidak mencabar PW3 berkaitan ini, dan oleh itu, keterangan PW3 tersebut harus dianggap sebagai diterima oleh pembelaan sebagai sesuatu yang tidak dipertikai. Kedua-dua mahkamah di bawah telah mempertimbang dengan teliti pembelaan pra-kelulusan perayu pertama dan telah menolaknya dengan betul.

(3) Hujah pembelaan bahawa pertuduhan-pertuduhan subahat harus dipinda dari s. 109 ke s. 107 Kanun tidak dapat diterima. Membaca kedua-dua seksyen ini dengan teliti menunjukkan dengan jelas bahawa setiap satu halkeadaan yang terkandung di dalam s. 107 yang membentuk subahat juga diterap ke dalam Penjelasan kepada s. 109. Seksyen 109 dan Penjelasan kepadanya harus dibaca secara keseluruhan, iaitu secara konjunktif, dan tidak secara terasing. Oleh itu tiada alasan untuk meminda pertuduhan-pertuduhan subahat dari s. 109 ke s. 107 Kanun memandangkan kedua-dua seksyen merujuk kepada halkeadaan-halkeadaan yang serupa. Pindaan yang dibangkitkan di dalam hujah pembelaan, jika dibenarkan, akan mengakibatkan tertuduh tidak diberitahu mengenai hukuman di bawah s. 109 Kanun. Ini akan menafikan perayu kedua peluang untuk mengetahui hukuman maksima yang diperuntukkan bagi kesalahan-kesalahan dengan mana beliau dituduh, dan tentunya menyalahi kaedah-kaedah penting keadilan semulajadi. Pertuduhan subahat di bawah s. 109 Kanun adalah teratur dan tidak cacat dan tidak memerlukan apa-apa pindaan.

(4) Perayu kedua telah membekalkan perayu pertama dengan inbois-inbois dengan menggunakan kepala surat Shen Hua di mana perayu kedua adalah pemilik tunggalnya. Oleh kerana perayu kedua adalah penulis dan pembuat inbois-inbois, maka inbois-inbois jelas boleh diterima-masuk. Tujuan inbois-inbois adalah untuk mendapatkan pinjaman sewa beli dari Hong Leong Finance. Terdapat keterangan yang banyak tentang subahat, dalam ertikata perayu kedua, dengan membuat dan membekalkan inbois-inbois, telah dengan sengaja membantu perayu pertama dalam melakukan kesalahan menipu. Kelakuan perayu kedua jelas termasuk dalam lengkongan subahat sepertimana ia ditakrif oleh s. 107(c) serta jejari ketiga Penjelasan kepada s. 109 Kanun. Berhubung dengan inbois-inboisnya itu, tiada percubaan dibuat oleh perayu kedua untuk memeriksa balas saksi-saksi pendakwaan, terutama sekali PW3. Ini bererti ia mengakui testimoni-testimoni mereka. Akibatnya perayu kedua tidak boleh berkata bahawa inbois-inbois yang dikeluarkan olehnya ini tidak boleh diterima-masuk. Hujah pembelaan ini telah ditolak dengan betulnya oleh kedua-dua mahkamah di bawah.

(5) Amat jelas bahawa rayuan di sini secara pentingnya adalah terhadap dapatan-dapatan fakta yang dibuat oleh kedua-dua mahkamah di bawah berdasarkan keterangan-keterangan yang dikemukakan semasa perbicaraan. Terkecuali dalam halkeadaan-halkeadaan yang luarbiasa, umpamanya di mana dapatan fakta jelas bercanggah dengan arus keterangan, atau di mana inferens fakta sekunder tidak munasabah atau tidak logik dan menuntut campur tangan rayuan, sebuah mahkamah rayuan akan keberatan mengganggu dapatan-dapatan fakta yang dibuat.

(6) Rayuan perayu pertama terhadap hukuman-hukuman yang dikenakan adalah tidak bermerit. Proses hukuman melibatkan pelaksanaan budi bicara kehakiman oleh hakim bicara, dengan mengambilkira fakta-fakta dan halkeadaan yang wujud dalam setiap kes. Dalam ketiadaan pelaksanaan budi bicara yang tidak diizin, di luar batas atau tidak relevan oleh mahkamah-mahkamah di bawah, maka mahkamah ini seharusnya merasa keberatan malah harus enggan mengganggui hukuman-hukuman yang dijatuhkan.

Case(s) referred to:
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Bhandulanand Jayatilake [1982] MLJ 83 ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Datuk Sahar Arpan v. PP [2007] 1 CLJ 326 CA ***(refd)***
DP Vijandran v. PP [1999] 1 CLJ 691 CA ***(refd)***
K Saravanan S Karupiah v. PP [2002] 4 CLJ 144 CA ***(refd)***
PP v. Abang Abdul Rahman [1982] 1 MLJ 346 ***(refd)***
PP v. Ishak Hj Shaari and Other Appeals [2003] 3 CLJ 843 FC ***(refd)***
PP v. Lawrence Tan Hui Seng [1993] 4 CLJ 221 SC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Munusamy [1980] 2 MLJ 133 ***(refd)***
PP v. Norazam Ibrahim [2006] 3 AMR 524 ***(refd)***
Rosli Supardi v. PP [2002] 3 CLJ 544 CA ***(refd)***
Transport Ministry v. Garry (1973) 1 NZLR 120 ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)
Criminal Procedure Code, ss. 158, 173(f), 180, 422
Penal Code, ss. 24, 107(c), 109, 420

For the 1st appellant - Karpal Singh (Jagdeep Singh Deo with him); M/s Karpal Singh & Co
For the 2nd appellant - K Kumarendran (A Athimulan with him); M/s Kumar & Co
For the prosecution - Manoj Kurup; DPP

JUDGMENT

Low Hop Bing JCA:

Appeals

[1] Both the appellants have been convicted and sentenced by the George Town Sessions Court judge ("the trial judge"). Their appeals to the Penang High Court judge have been dismissed. They have now lodged their appeals before this Court. Particulars of the appellants and the orders against which they have appealed are:

Appellant	Orders appealed against
(1) Loh Liang Gun in Court of Appeal Criminal Appeal No. P-09-26-2000 ("the first appellant")	Convicted on 10 counts of cheating under s. 420 of the Penal Code and sentenced to four years imprisonment on each of the first five counts; and five years imprisonment each on the rest, all the 10 sentences to run concurrently.
(2) Kung Lye Huat in Court of Appeal Criminal Appeal No. P-09-13-2004 ("the second appellant")	Convicted on nine counts of abetting the first appellant, punishable under s. 109 of the Penal Code and sentenced to two years imprisonment on each of the first four counts; and three years each on the other counts, all the nine sentences to run concurrently.

[2] The ten charges preferred against the first appellant concerned the offence of cheating Hong Leong Finance Bhd. at No. 54, Jalan Dato Keramat, Pulau Pinang ("Hong Leong Finance") by dishonestly inducing the staff of Hong Leong Finance to believe that the particulars contained in ten sets of proposal forms for hire purchase loans for vehicles in the applicants' names respectively were true and correct and to deliver ten payments totalling RM440,000 to Shen Hua Used Car Trading Co. ("the Used Car Company"). The other relevant particulars of the charges are best tabulated as follows:

Charge	Date	Vehicle	Exhibit	Amount (RM)
(1)	9.10.90	Honda Civic	P.12	33,000
(2)	6.9.90	Honda Accord	P.13	40,000
(3)	20.9.90	Benz	P.14	50,000
(4)	14.9.90	Benz	P.15	50,000
(5)	24.9.90	Volvo 240	P.16	40,000

(6)	7.9.90	Volvo 740	P.17	50,000
(7)	2.10.90	Volvo 740	P.18	50,000
(8)	21.9.90	Volvo 240	P.19	40,000
(9)	17.8.90	Volvo 240	P.20	47,000
(10)	4.10.90	Volvo 240	P.21	40,000
		Total		440,000

[3] The second appellant was charged with abetting the first appellant in the commission of the offences contained in charges 2 to 10 above.

[4] The prosecution has withdrawn the first abetment charge against the second appellant.

Essential Ingredients Under s. 420

[5] For the purpose of sustaining the charges of cheating against the first appellant under s. 420, the prosecution must establish the following ingredients:

(1) Hong Leong Finance delivered property (ie, the amount stated in the charges respectively) to another person (here, the second appellant);

(2) The first appellant induced Hong Leong Finance to deliver that property to the second appellant;

(3) Hong Leong Finance acted upon such inducement in consequence of the first appellant's deceit;

(4) The first appellant acted dishonestly in so inducing Hong Leong Finance to part with the property; and

(5) Hong Leong Finance suffered damage or harm as a result of the deceit.

Delivery Of Property

[6] This essential ingredient has been established when Hong Leong Finance delivered the total sum of RM440,000 representing the amount stated in the charges respectively, to the D & C Bank account of the second appellant ("the second appellant's bank account").

A **Inducement**

[7] The audit manager (PW1) and the audit executive (PW2), both of the parent bank i.e. Hong Leong Bank, gave unchallenged evidence that the first appellant's duties as a marketing officer of
B Hong Leong Finance were to interview the applicants to ensure that their particulars in the proposal forms were correct, to inspect the vehicles and verify them with the Road Transport Department, to visit the applicants at their respective addresses, to reject proposal forms from unqualified or ineligible applicants, and finally
C to submit the verified proposal forms with his recommendations to the branch manager (PW3). PW3 would not have given his approval to these applications in the proposal forms if the first appellant had not submitted them to PW3.

D **[8]** The first appellant had by his recommendations on the proposal forms falsely represented to Hong Leong Finance that all the particulars provided by the first appellant had been checked and verified by him to be true and correct.

[9] Acting upon the first appellant's recommendations and false
E representations, Hong Leong Finance through PW3 had been induced and had approved the hire-purchase loans. That led to the delivery of the monies by Hong Leong Finance to the second appellant's bank account.

F **[10]** There can be no doubt that the prosecution has established this essential ingredient.

Deceit

[11] PW2 testified that the proposal forms stated that the first
G appellant had verified all the particulars therein including the applicants' addresses and occupations.

[12] PW3 testified that the first appellant must ensure that every process in the application for the hire-purchase loans was in good
H order. However, the particulars contained in all the proposal forms were false eg, the applicants and their addresses were non-existent, and the particulars purportedly derived from the applicants' identity cards belonged to people other than the holders thereof. Worst of all, some applicants were actually
I deceased. Some "cars" stated in the proposal forms were actually motorcycles, and the owners thereof were people other than those stated therein.

[13] To say the least, the first appellant had completed the proposal forms with patently false particulars which he had purportedly checked and verified, thereby intentionally deceiving Hong Leong Finance into believing that all particulars were correct in order to procure the approval for the hire purchase loans which Hong Leong Finance would not have done had the truth been made known by the first appellant to Hong Leong Finance.

Dishonestly

[14] Section 24 of the Penal Code where relevant provides that whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly".

[15] The first appellant had completed the proposal forms with false particulars and given his recommendations which had induced the delivery of all the hire purchase loans amounting to RM440,000 by Hong Leong Finance to the second appellant. There was clearly a wrongful loss to Hong Leong Finance and a wrongful gain to the second appellant. The delivery of the sum of RM440,000 by Hong Leong Finance would not have been done had it not been for the acts of the first appellant. The first appellant had undoubtedly acted dishonestly within the meaning of s. 24.

Damage

[16] The damage which Hong Leong Finance has incurred as a result of the dishonest acts of the first appellant was indisputably the sum of RM440,000 which had been delivered by Hong Leong Finance and credited to the second appellant's bank account.

Abetment Under s. 109 Penal Code

[17] To sustain a charge of abetment against the second appellant under s. 109, the prosecution has to prove that the second appellant had abetted the first appellant in the commission of the offence of cheating under s. 420.

[18] The second appellant had played the role of providing the first appellant with invoices bearing the letterhead of the Used Car Company of which the second appellant was the sole proprietor and stating that the vehicles were in his possession. The second appellant had issued these invoices for the purpose of procuring

A the hire purchase loans from Hong Leong Finance. He provided the connection between the invoices and the delivery of the various sums representing the hire purchase loans. The second appellant had used his bank account as a conduit to credit the delivery of the payments from Hong Leong Finance.

B

[19] The invoices were as good as documents of title in the used car business. The persons named in the invoices were the payees. There would have been no delivery of the hire purchase loans by Hong Leong Finance if the second appellant had not issued such C invoices. It is significant to note that all the invoices were issued by the second appellant in the name of the Used Car Company for the purpose of procuring the delivery by Hong Leong Finance of nine payments as stated in the nine charges of abetment against the second appellant. The particulars in the invoices were false as D the cars stated therein had never existed and no down-payment thereon had ever been made. All the nine payment vouchers revealed that payments were made by Hong Leong Finance and credited to the second appellant's bank account.

E **[20]** In my view, abetment has been proved against the second appellant.

[21] I shall now examine the issues raised in this appeal.

Standard Of Proof

F

[22] First appellant's learned counsel Mr. Karpal Singh (Mr. Jagdeep Singh Deo with him) submitted that for the 10 charges against the first appellant relating to the incidents in 1990, the applicable law was that prior to the amendment to s. 173(f) of the G Criminal Procedure Code ("CPC"), and the trial judge would have to conduct a maximum evaluation of the evidence led by the prosecution and be satisfied that the prosecution had established its case beyond reasonable doubt, before the first appellant could be called upon to enter his defence, but the trial judge had H applied the *prima facie* standard which was the wrong test. Support was sought in *Arulpragasan a/l Sandaraju v. PP* [1996] 4 CLJ 597 FC; *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645 FC; and *PP v. Mohd. Radzi bin Abu Bakar* [2006] 1 CLJ 457 FC.

I

[23] He added that there was a fundamental miscarriage of justice and s. 422 of the CPC was of no assistance to the prosecution, citing *PP v. Ishak bin Haji Shaari and Other Appeals* [2003] 3 CLJ 843 CA; and *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 CA.

[24] The second appellants' learned counsel Datuk K. Kumarendran (Mr. A. Athimulan with him) adopted the above submission.

[25] Learned deputy public prosecutor Mr. Manoj Kurup responded that at the close of the prosecution's case, the trial judge had applied the correct standard of proof in line with the same language used in *Ishak bin Haji Shaari, supra*, and that the High Court judge at the stage of the intermediate appeal had correctly dismissed the above defence contention. He relied on *Rosli Supardi v. PP* [2002] 3 CLJ 544 CA; and *K Saravanan S Karupiah v. PP* [2002] 4 CLJ 144 CA.

[26] In order to resolve this issue, I find it appropriate to consider the authorities cited for the defence.

[27] In *Arulpragasan, supra,* the Federal Court was asked to decide on the standard of proof required from the prosecution under the then s. 180 of the CPC in order that a High Court judge may rule that there is a case for the accused to answer. The majority view of the Federal Court applied the usual criminal standard of proof, to wit, beyond all reasonable doubt which called for a maximum evaluation of evidence tendered by the prosecution, instead of the much lower standard of proof of a mere *prima facie* case which called for a minimal evaluation thereof.

[28] A similar sentiment was expressed by the Federal Court in *Dalip Bhagwan Singh, supra,* in relation to a summary criminal trial before a subordinate court under the then s. 173(f) of the CPC.

[29] In *Mohd Radzi bin Abu Bakar, supra,* at p. 398 para 4, Gopal Sri Ram JCA delivered the unanimous judgment of the Federal Court and explained as follows:

> [4] In our respectful view, *Arulpragasan* is authority for the proposition that the test to be applied under the former ss. 173(f) and 180 of the CPC is that the prosecution must establish its case beyond a reasonable doubt before an accused could be called upon to enter his defence. *It is not authority for the proposition that it is incumbent for a court to make a finding at the close of the prosecution's*

A *case that he was satisfied that the prosecution had proved its case beyond reasonable doubt. The failure by the trial court either to make or to record such a finding does not in our judgment occasion a miscarriage of justice. It is sufficient for the judicial arbiter – be he judge or magistrate – to give his reason in his written grounds of judgment for requiring an accused to make his defence.* (emphasis added).

B

[30] In the light of the above Federal Court judgment, it is necessary for me to revert to the trial judge's written grounds of judgment which required the first appellant to enter his defence. The relevant portion of his written grounds of judgment is to be
C found at p 397 vol 3 of the appeal record which reads as follows:

> Hence, I found that there was a case for A1 to answer on evidence that was, at that stage, beyond any reasonable doubt, for the offence of cheating.

D **[31]** Given that backdrop, can the trial judge be said to have misdirected himself on the standard of proof?

[32] The trial judge has considered the sufficiency of evidence and applied the standard of proof beyond any reasonable doubt before
E he ordered the first appellant to enter his defence. I am therefore of the view that there was no error or miscarriage of justice: See *Ishak bin Haji Shaari, supra* at p 6001, per Mohd Noor Ahmad JCA (later FCJ).

F **[33]** Be that as it may, it has been held that in an exceptional case, where the evidence is clear and cogent, an appellate court may affirm a conviction despite a misdirection: *Tunde Apatira, supra* FC, which was followed by the Court of Appeal in *Rosli Supardi, supra.*

G **[34]** In *K Saravanan, supra,* the Court of Appeal through the judgment Mohd Noor Ahmad JCA (later FCJ) held that if upon scrutiny of the whole evidence, there is overwhelming evidence to show that the prosecution has proved its case beyond reasonable doubt, the choice of the words *"prima facie"* was only the wrong
H usage of words, in which case, the Court of Appeal applied the proviso to s. 60(1) of the Courts of Judicature Act 1964 and held that no substantial miscarriage of justice had occurred.

[35] Having carefully perused the volumes of evidence adduced at
I the trial, which I have analysed and crystallized above, I find that there is overwhelming evidence to show that the prosecution has proved all the charges against both the appellants herein beyond

reasonable doubt and that in both the courts below, there was no misdirection of law relating to the standard of proof. The appellants have not suffered any prejudice. They have not been denied a fair trial.

Defence Of Pre-approval

[36] It was argued for the first appellant that the transactions in question had in fact been pre-approved by PW3 and the first appellant merely filled in the particulars, as a result of which it could not be said that it was the first appellant's deceit which had caused the delivery of the monies in question.

[37] The prosecution asserted that the trial judge had correctly rejected the first appellant's defence of pre-approval and that rejection had been rightly affirmed by the High Court judge.

[38] In my judgment, the issue of whether there was pre-approval by PW3 is a question of mixed fact and law.

[39] It is to be noted that although the first appellant had mounted an incisive cross-examination of PW3, the issue of PW3's pre-approval had never been posed or suggested to PW3. Both the courts below found no evidence of pre-approval whatsoever.

[40] In fact, PW3 testified that the first appellant was at the material time the marketing officer dealing with and taking charge of these ten transactions. He gave his approval thereto on the basis of the first appellant's recommendations on the proposal forms which were completed and submitted by the first appellant. The first appellant had dishonestly entered a whole range of false particulars in the proposal forms for the purpose of deceiving Hong Leong Finance.

[41] The defence in the course of cross-examining PW3 had not challenged PW3 on this. I therefore hold that PW3's evidence in this regard must be deemed to have been accepted by the defence as uncontroverted. This proposition of law is supported by weighty authorities. In *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212 at p 213 right column C-F, Raja Azlan Shah CJ (M) (now HRH the Sultan of Perak) held, *inter alia*, that:

> On this point, we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[42] The eminent learned Chief Justice also referred to the various exceptions set out in the judgment of the Supreme Court of *New Zealand in Transport Ministry v. Garry* [1973] 1 NZLR 120, 122, but those exceptions do not appear to have any application here. (See also *Public Prosecutor v. Abang Abdul Rahman* [1982] 1 MLJ 346 HC; and *Public Prosecutor v. Norazam bin Ibrahim* [2006] 3 AMR 524-530 HC).

[43] In my view, both the courts below have very carefully considered and correctly rejected the first appellant's defence of pre-approval.

Abetment Charges

[44] It was argued for the second appellant that the trial judge should have invoked s. 158 of the CPC to amend the charges under s. 109 to charges under s. 107 of the Penal Code.

[45] The prosecution refuted the defence contention as baseless and added that no amendment is necessary.

[46] At the intermediate appeal, the High Court judge has seen it fit to dismiss the defence contention.

[47] In my judgment, the abetment charges against the second appellant were preferred under s. 109 read with s. 420 in order to include the punishment to be meted out for the offence of abetment which is prescribed and contained in s. 109 in the following words:

> 109. Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment.
>
> Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.
>
> Explanation – An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

[48] Section 107 on the other hand does not provide for any punishment but instead sets out each and every circumstance in which the offence of abetment may be committed. It reads as follows:

> 107. Abetment of a thing.
>
> A person abets the doing of a thing who:
>
> (a) instigates any person to do that thing;
>
> (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of the conspiracy, and in order to the doing of that thing; or
>
> (c) intentionally aids, by any act or illegal omission, the doing of that thing.

[49] The defence contention that the abetment charges should be amended from s. 109 to s. 107 is indeed unsustainable. A careful reading of these two sections clearly shows that each and every circumstance contained in s. 107 as constituting abetment has also been incorporated in the Explanation to s. 109. Section 109 and the Explanation thereto must be read as a whole ie, in conjunction and not in isolation. There can be no question of amending the abetment charges from s. 109 to s. 107 when these two sections refer to identical circumstances.

[50] The amendment raised in the defence contention, if sustained, would have resulted in the accused not being informed of the punishment under s. 109. That would have deprived the second appellant of the opportunity of knowing fully the maximum sentence provided for the offences with which he has been charged, and certainly would have run counter to the fundamental rules of natural justice.

[51] I hold that the abetment charges under s. 109 are flawless and proper. They require no amendment at all.

Evidence Of Abetment

[52] It was canvassed for the second appellant that apart from the evidence that the monies have been delivered to the second appellant's bank account, there was nothing to incriminate him since photocopies of the invoices were not admissible.

[53] The learned deputy responded that the second appellant was the maker of these invoices.

[54] In my judgment, the substance of the defence contention may be ascertained by revisiting the concurrent finding of facts by both the courts below.

[55] The second appellant had provided the first appellant with invoices bearing the letterhead of the Used Car Company of which the second appellant was the sole proprietor. As the second appellant was the maker and author of these invoices, they are clearly admissible.

[56] The purpose of the invoices was to secure hire purchase loans from Hong Leong Finance. There is overwhelming evidence of abetment, in that the second appellant by making and providing these invoices has intentionally aided the first appellant in the commission of the offences of cheating. The second appellant's conduct clearly comes within the ambit of abetment as defined in s. 107(c) and also the third limb of the Explanation to s. 109.

[57] In relation to his own invoices, the second appellant had not even made a feeble attempt to cross-examine prosecution witnesses especially PW3. This would amount to an acceptance of their testimonies: See *Wong Swee Chin, supra.* The second appellant cannot now be heard to say that these invoices issued by him are inadmissible. I am of the view that this defence contention has been correctly dismissed by both the courts below.

Concurrent Finding

[58] It is abundantly clear to me that these appeals are essentially against the concurrent factual finding of both the courts below based on evidence adduced at the trial. Save in exceptional circumstances eg, where the finding of facts is plainly against the weight of evidence, or the inference of secondary facts is unreasonable or illogical thereby warranting appellate interference, an appellate court is slow in disturbing the concurrent finding: see eg, *PP v. Munusamy* [1980] 2 MLJ 133, 136 left I FC per Hashim Yeop Sani J (later CJ(M)); *DP Vijandran v. PP* [1999] 1 CLJ 691, 695h CA per Gopal Sri Ram JCA; and *PP v. Lawrence Tan Hui Seng* [1993] 4 CLJ 221, 226f per Edgar Joseph Jr SCJ (as he then was).

Convictions

[59] On the foregoing grounds, both the appeals against convictions are hereby dismissed.

Sentences

[60] It was pleaded on behalf of the first appellant that he was a businessman by profession and a first offender, in which case the sentences imposed on him, as adumbrated at the outset of this judgment, were excessive.

[61] There was no appeal by the second appellant against the sentences meted out against him.

[62] There was no cross-appeal by the prosecution on ground of inadequacy of sentences. The prosecution however urged this court to affirm these sentences.

[63] I am unable to find any merit in the first appellant's appeal against the aforesaid sentences. The process of sentencing involves an exercise of judicial discretion by the trial judge, having regard to the facts and circumstances prevailing in each particular case. In the absence of any unauthorized, extraneous or irrelevant exercise of discretion by both the courts below, this court should be slow and indeed should refrain from disturbing the aforesaid sentences: (see eg, *Bhandulanand Jayatilake* [1982] MLJ 83, 84 FC and *Datuk Sahar bin Arpan v. Public Prosecutor* [2007] 1 CLJ 326.)

[64] The first appellant's appeal against the sentences meted out against him is dismissed.

[65] In the circumstances, all the aforesaid sentences against both the appellants are hereby affirmed.

[66] My learned brothers Tengku Baharudin Shah bin Tengku Mahmud and Raus Sharif JJCA have read this judgment in draft and expressed their agreement with it.